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- Carnation Co. v. National Labor Relations Board, 429 F. 2d 1130 — 9
- Frito-Lay, Inc. v. National Labor Relations Board, 385 F. 2d 180 — 9
- National Labor Relations Board v. Abell Co., 327 F. 2d 1 — 9
- National Labor Relations Board v. United Insurance Co., 390 U.S. 254 — 8

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- National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-504

THE NEWS-JOURNAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported. The Board's decision in the unfair labor practice proceeding (Pet. App. 21a-31a) is reported at 185 NLRB No. 40, and its decision in the related representation proceeding (Pet. App. 8a-20a) is reported at 180 NLRB No. 137.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on August 19, 1971. The petition for a writ

of certiorari was filed on October 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that the company's newspaper delivery drivers are employees rather than independent contractors, and thus protected by the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are Section 2(3) (Pet. 3), and:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

Petitioner, the News-Journal Company, publishes two newspapers, the Morning News and Evening Journal, in Wilmington, Delaware. It has 21 delivery drivers who transport the papers to the Company's carrier boys and motor route drivers for ultimate delivery to the customer (Pet. App. 9a). On February 27, 1969, the Newspaper Guild of Greater Philadelphia, Local 10, AFL-CIO, filed a representation petition with the Board's

Regional Director seeking to represent the Company's delivery drivers (Pet. App. 8a-9a). At the hearing on the petition, the following evidence was adduced:

In the early 1960's the Company, dissatisfied with its distribution system, began to phase out the independent trucking companies which, under contract, were delivering the newspaper bundles from the plant to the carrier boys and motor route operators (Pet. App. 10a; A. 28-29).[1] At that time, the Company also automated its mail room, thus necessitating the layoff of a substantial number of mail room employees (Pet. App. 10a; S.A. 1). The Company offered individual contracts to a number of these mailers as well as to others to serve as the deliverers of the Company's newspapers (*ibid.*).

Under the contracts, the delivery drivers agree to supply their own trucks and deliver the papers from the Company plant to addresses the Company designates along routes in specified territories. In return, the Company agrees to make fixed weekly payments. The contract further provides that the deliverer shall transport and deliver the papers daily, regularly and promptly, and shall exercise due diligence to protect the papers from damage due to handling and the elements; that he shall deliver the papers at his own risk and expense, and according to his own methods of control; and that the contract shall continue in effect until terminated by either party, although it may be terminated without notice by the Company at any time upon

[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, in the court of appeals.

breach by the driver of any of its provisions. The contract also recites that it contains the entire agreement between the parties and that its terms "shall not be changed, modified, altered or supplemented except in writing signed by [the] parties"[2] (Pet. App. 10a-11a; A. 103-106).

Each driver is required to be present at the loading dock from 15 to 45 minutes before the edition of a newspaper is due to come off the press. Mail room personnel count and bundle the papers when they leave the press room, affix a label to each bundle designating where it is to be delivered, and then send the bundle down the chute to the loading dock (Pet. App. 12a; A. 47-48, 77-78, 55-56). After the driver loads his truck, he delivers the papers to the prearranged locations, where the carrier boys and motor route operators pick them up. Once a driver delivers the papers his task is completed. He is not involved in the sale of the product to the carrier boys or motor route drivers (Pet. App. 12a; A. 35).

Delivery drivers are observed by the Company's district managers, who are also in charge of the carrier boys and the motor route operators. Although these contacts vary in frequency, District Manager Watts

[2] In fact, however, the contracts in most cases are not current and do not reflect the drivers' actual work requirements and compensation (see A. 106-134). For example, driver Alphonse Bolduc's contract provides for an income of $60 per week and delivery to a certain area, whereas he currently receives $180 per week and his territory consists of routes in a different area (A. 110-111; S.A. 6-9). Wallace Axselle's contract calls for $165 per week; currently he is receiving $180 per week (A. 106; A.S. 3-6). Rodney Cahall's contract calls for $185 per week; currently he is receiving $235 per week (A. 113).

stated that he sees one of his drivers as often as 3 or 4 times a week to make sure "that things are going okay" (A. 96-98). These officials check to see that the papers are not dropped in mud, water, or dirt, and that the deliveries are made on time (Pet. App. 1a; A. 81, 94-95). Where papers have been damaged due to exposure to the elements, District Manager Watts has told his drivers to drop the papers at other, more suitable, places (A. 94, 97). If the driver does not cooperate, Watts issues a special directive requiring him to "go to a certain place on bad weather days" (A. 97). Other infractions involving the manner in which the driver performs his functions, when called to the attention of the district manager, have resulted in discussions between the driver and the district manager, or in the latter reporting the driver to another Company official for reprimand (Pet. App. 12a; A. 94, 94, 98).

The Company often changes the routes the men drive. Such changes are initiated by the district managers and approved by their supervisors, and are relayed to the drivers via the mail room. (Pet. App. 12a-13a; A. 40-41.) For example, driver Raymond Mutter stated that 12 to 14 such changes had been made in his runs in 3 months (A. 79), and driver Rodney Cahall stated that his route had been changed approximately 3 to 4 times per month (A. 87). These changes may involve an increase in the route mileage, the number of papers or bundles handled, the number of drop locations, or the amount of time involved in servicing the area (Pet. App. 13a; A. 42-43, 79-80). The changes are instituted without seeking the approval of the driver, even though they may substantially modify the route as

originally drawn (A. 41-42, 96). No driver has ever refused to comply with the changes (A. 102).[3]

The Company also reorganizes routes, taking away portions of one driver's service area and thereby creating a new run for another driver (Pet. App. 11a-12a; A. 65-70). These changes are frequently made by the Company in the interest of providing better service to dealers (A. 67, 70, 107, 111, 121, 123). Occasionally, the revision is made at the request of a driver who finds an area too difficult to handle for personal reasons (Pet. App. 12a; A. 6; 71, 73, 88). While these reorganizations often involve an increase in route mileage, number of papers handled, number of drop locations, and route service time, they do not necessarily result in additional compensation for the driver (Pet. App. 13a; A. 79). For example, one deliverer was assigned an additional 800 papers on one occasion, and was required to service 3 additional drop points and cover 5 additional miles on another occasion. He received no increase in compensation for either of these changes (A. 79-81).

In addition, the Company has unilaterally made other kinds of changes in the work routine of the drivers. Thus, the Company maintains "honor boxes" at various locations, where papers are sold to the public on an honor-system basis. These boxes were originally serviced by certain drivers who purchased the papers wholesale and resold them at the honor boxes along

[3] On one occasion, driver Mutter became disgruntled at a large increase ordered in the number of papers he was to haul and asked the assistant circulation director to reconsider the change (A. 79-80). He was told that "if [he] didn't like [his] route [he] could give it up" (A. 41, 80).

their route. The Company, on its own, terminated this policy and assigned all of the honor boxes to a single driver (A. 32-33, 86; S.A. 2.) Moreover, although their contracts do not call for the delivery of honor boxes, stakes, and tubes (receptacles for home delivery), a driver will often find these items waiting for him at the loading dock with instructions that they be delivered to a certain location. The driver does not receive extra compensation for this task (A. 89).

Based on these facts, the Board concluded that the deliverers are not independent contractors, but employees of the Company within the meaning of the National Labor Relations Act (Pet. App. 18a). In support of its conclusion, the Board noted that (Pet. App. 17a-18a):

> The services rendered almost exclusively consist of the routine manual work of loading and driving trucks over agreed-upon routes and dropping off bundles of newspapers properly and in a prearranged sequence or order at designated drop spots. The possibility of realizing any meaningful added profit by changing the established method of operation appears to be very limited. * * * The deliverers retain practically no independence in their operations; they cannot decide when or whether they will go out on an assigned route; they cannot fix the time of delivery; and they cannot determine that others should drive their vehicles, except in cases of illness, vacation, or excusable absence, when they provide and pay for their own substitutes. * * *

> * * * The territories and drop spots are predetermined by the distribution and district managers. All that remains to be done is the physical work of loading, truck driving, and dropping off the paper bundles. There is no room for the exercise of true discretion in the performance of the work. The drop spots are changed, without consultation, by written orders of the district manager which are relayed to the deliverers by the mailroom at pickup time. The deliverers may not receive added compensation for some of these changes. The district managers tell the deliverers how to properly drop off their bundles and rely on the distribution manager for further corrective and disciplinary measures. There is necessarily close supervision of the deliverers to insure proper timely delivery of the paper to the ultimate subscriber.

The Board directed that an election be held among the delivers. The Union won the election and was certified as their bargaining representative (Pet. App. 19a, 23a). Thereafter, the Company refused to bargain with the Union, and in the ensuing unfair labor practice proceeding the Board found the Company to be in violation of Section 8(a)(5) of the Act and ordered it, *inter alia,* to bargain with the Union upon request (Pet. App. 28a-30a).

The court of appeals sustained the Board's findings and enforced its order (Pet App. 1a-6a).

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.,* 390 U.S. 254, 256, this Court held that, in

distinguishing between employees and independent contractors for purposes of the Act,[4] "general agency principles" are to employed and "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive" (390 U.S. at 258). As shown above, the Board, upheld by the court below (Pet. App. 5a), considered the total employment relationship in concluding that the drivers were employees.[5] Thus, petitioner's contention that the Board erred merely raises a factual issue which does not warrant further review.

The cases relied on by petitioner (Pet. 13-15) as establishing a conflict among the circuits are distinguishable. In *Frito-Lay, Inc.* v. *National Labor Relations Board,* 385 F. 2d 180, 186 (C.A. 7), and *Carnation Co.* v. *National Labor Relations Board,* 429 F.2d 1130, 1132 (C.A. 9), the drivers set the retail price for the products they delivered and their profits depended on the difference between that price and the wholesale price at which they purchased the product. The drivers here did not enjoy that opportunity to increase their income. In *National Labor Relations Board* v. *Abell Co.,* 327 F. 2d 1, 7 (C.A. 4), unlike here, the court found that the delivery drivers operated "largely uninhibited by publisher control."

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[4] Section 2(3) of the National Labor Relations Act provides that the term "employee" shall not include "any individual having the status of an independent contractor."

[5] Petitioner's contention (Pet. 12) that the Board and the court below primarily relied upon the low profit potential for and the limited skill needed by the truck-driver delivery men misconstrues the decisions, which show that all elements of the relationship were taken into account. See Pet. App. 5a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.
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